



**Lihanda & 5 others (Suing as Trustees and on behalf of Pentecostal Assemblies Of God Kenya) v Munavo (Environment & Land Case 3 of 2022) [2024] KEELC 4954 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4954 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT & LAND CASE 3 OF 2022**

**E ASATI, J**

**JUNE 13, 2024**

**IN THE MATTER OF LIMITATION OF ACTIONS ACT 22 LAWS OF KENYA  
IN THE MATTER OF PARCEL NO. NORTH MARAGOLI/CHAVAKALI/145**

**BETWEEN**

**REV PATRICK LIHANDA ..... 1<sup>ST</sup> PLAINTIFF  
REV NEBERT MISIGO MUDAKI ..... 2<sup>ND</sup> PLAINTIFF  
MOSES MOGITA ANYENGA ..... 3<sup>RD</sup> PLAINTIFF  
LUKA KIMELI KIPKEMOI ..... 4<sup>TH</sup> PLAINTIFF  
BEDINA KAGEHI MALEA ..... 5<sup>TH</sup> PLAINTIFF  
LYDIA WANJIAH ..... 6<sup>TH</sup> PLAINTIFF  
SUING AS TRUSTEES AND ON BEHALF OF PENTECOSTAL ASSEMBLIES OF  
GOD KENYA**

**AND**

**STEPHAN LUSINA MUNAVO ..... DEFENDANT**

**JUDGMENT**

1. Vide the amended Originating Summons date 13<sup>th</sup> July 2023, the applicant/Plaintiff who claims land Parcel No. Maragoli/Chavakali/145 measuring approximately 0.45Ha or thereabout by virtue of adverse possession and trust, placed before the court the following questions for determination: -
  - a. Whether the applicant is entitled to land parcel No. Maragoli/Chavakali/145 by virtue of adverse possession and trust;



- b. Whether the applicant should be registered as the proprietor of L.R No. Maragoli/Chavakali/145;
  - c. Whether the registration of the Respondent as the sole proprietor of L.R Maragoli/Chavakali/145 should be cancelled and the Respondent transfers the said land to the applicant
  - d. Whether the Respondent holds the land in question in trust for the applicant.
  - e. Whether the Respondent's proprietary rights are extinct by virtue of effluxion.
2. The Originating Summons sought for orders of: -
- i. A declaration that the applicant is entitled to Land Parcel No. Maragoli/Chavakali/145 measuring 0.05 Ha. or thereabouts by virtue of adverse possession.
  - ii. A declaration that upon expiry of 12 years, the Respondent hold the said L.R No. Maragoli/Chavakali/145 in trust for the applicant.
  - iii. A declaration that upon expiry of 12 years, the Respondent 's interest in land in L.R No. Maragoli/Chavakali/145 got extinct.
  - iv. A declaration that the Respondent do transfer land parcel L.R No. Maragoli/Chavakali/145 to the applicant and /or in default the Executive officer of the court do execute all the necessary documents to effect transfer.
  - v. A declaration that the registration of the Respondent as the proprietor of L.R No. Maragoli/Chavakali/145 be cancelled.
  - vi. An order under Section 38 of the *Limitation of Actions Act* Cap 22 Laws of Kenya that the applicant be registered as the proprietor of L.R NO. Maragoli/Chavakali/145 instead of the Respondent.
  - vii. An order for costs.
3. The grounds upon which the Amended Originating Summons was based are contained in the amended Originating Summons and the Supporting Affidavit sworn by one Nebert Misigo Mudaki on 13<sup>th</sup> July 2023 and the annexure thereto.
4. In reply to the amended Originating Summons the Respondent filed a reply dated 16<sup>th</sup> January 2024.
5. The matter was canvassed by way of oral evidence.

### **The Evidence**

6. On behalf of applicant two witnesses testified. PW1 was one Rev. Patrick Lihanda. He adopted the contents of his witness statement dated 10/6/2022 as his evidence in chief. He had stated in the said witness statement that he is the General Superintendent of the Pentecostal Assemblies of God (PAG-K), the plaintiff herein. That in 1976 the plaintiff purchased 20 meters width by 25 meters length out of L.R No. Maragoli/Chavakali/145 from Joram Ezava Chilongeli the original owner. That the land was for construction of Church offices and Pastor's residence of Walodeya PAG Assembly. That upon purchase the plaintiff took possession.
7. That the Church has had control and management of the land occasionally using it for church functions and meetings. That the Respondent has no legitimate stake or interest in the applicant's portion. That Rev. Amulavu Aggrey and his predecessors have for a period running into decades



- used the land for farming purposes. That the church had active and uninterrupted use, control and management of the suit land to the exclusion of the Respondent and any other person. That the Respondent served the church's Walodeya Assembly as church secretary. That the Respondent has never had possession or control of the portion belonging to the church.
8. PW1 produced Trust Deed, Certificate exempting registration, another Trust deed for the period 6/12/2013 to December 2018, Minutes and translation thereof and transfer of land form. That they have tried to solve the matter amicably to no avail.
  9. On Cross-Examination he stated that the Church had been involved in court case since 2018 over leadership: That the owner of the land was Elisi Adeka as at 1995. That there is a foundation for a pastor's house on the land. And on re- examination he stated that the purchase price was paid in full.
  10. PW2 testified through his witness statement dated 10/6/2022. He stated that in the year 2014 he was transferred to Walodeya PAG Assembly as the head Pastor where he served for 6 years. That during that period he used to cultivate the suit land. That from the church records, the land was bought in 1976 by the church. He stated on cross examination that there was no Church building on the land. That he found a foundation which had been constructed on the suit land. That the Defendant was their church secretary.
  11. The Defendant testified as DW1. He adopted the contents of his witness statement dated 7/3/2023 as his evidence in chief. That he bought the suit land from Elisi Esava. That he conducted search which showed that the land belonged to Elisi Adeka. That he has been using the land. He planted trees. That there is no church building or foundation for Pastors house on the land. That no church meeting has ever been held on the land. That the PAG Church has many cases. He produced exhibit namely; title deed, search and court order.
  12. On Cross-examination, he stated that he is the church secretary of Walodeyo P.A.G Church. That Elisi Adeka from whom he bought the land was the wife of Joram Adeka. That he bought the land in 2001 after Elisi Adeka had died. That he bought the land from a daughter in law of Elisi Adeka. That he did not have the sale agreement. That he did not know that the land had already been bought by the church. That PW2 used the portion of the land with his permission. That there is a boundary separating the 20 meter by 25 meter from the rest of the land. That the boundary was there when he bought the land. That he has planted trees on the land but not on the section that the church is claiming.

### **Submissions**

13. At the close of the evidence parties filed submissions.
14. Written submissions dated 4<sup>th</sup> May 2024 were filed by the firm of Karani Grey & Co advocates on behalf of the plaintiff. Counsel submitted that the applicant has used the portion of the suit land for long and relied on the case among others of Peter Mbiri Michuki vs Samuel Mugo Michuki (2014) where it was held inter alia that a purchaser in possession of the land purchased is a person in whose favour the period of limitation can run.
15. Written submissions dated 23<sup>rd</sup> April, 2024 were filed on behalf of the Defendant by the firm of Ondego Garo Advocates. Counsel submitted that the issue of time is of outmost importance for claims of adverse possession. Relying on the case of Joseph Macharia Kairu – vs- Kenneth Kimani Muiruri (2021) eKLR where it was held that time does not begin to run unless there is some person in adverse possession of the land. That it does not run because the land is vacant, Counsel submitted that in the present case the applicant failed to prove the date when the adverse possession began. That it was difficult for the applicant to prove the time frame and if the same was ever interrupted.



16. Counsel submitted further that concerning the nature of possession, use of the subject land, that adverse possession is a fact to be observed on the land. That the mere fact that the land is vacant does not mean that it is free for all. Counsel relied on the case of Gabriel Mbui- Vs- Mukinda Maraya (1993) eKLR to support this submission. That the applicant has not proved that it has had notorious usage or actual possession of the land thus it cannot claim the remedy of adverse possession.
17. Counsel submitted relied on the case of Leonard Otwori Juma- vs- Francis Ongaki Mabileo (2022) eKLR where it was held that a person who occupies another person's land with that other person's consent cannot be said to be in adverse possession, Counsel submitted that PW2 sought permission from the Respondent to plant maize on the subject land.
18. That courts are mandated by law and statute to consider a title document as prima facie evidence of ownership. Counsel relied on the case of Margaret Njeri Wachira and Eliud Wawuru (2018) eKLR and section 24 of the [Land Registration Act](#) to support the submission. That the Respondent confirmed by producing a title deed that he is the owner of the suit land.

### **Issues for determination**

19. The issues for determination herein are drawn from the questions in the Originating Summons for determination of the court as follows; -
  - a. Whether the applicant is entitled to the 20 meters by 25 meters portion of the suit land by adverse possession.
  - b. Whether the Respondent's title to the 20 meters by 25 Meters suit land has been extinguished.
  - c. Whether the Respondent is holding the 20 meters by 25 meters of the suit land in trust for the applicant.
  - d. Whether or not the portion of the suit land measuring 20 meters by 25 meters should be transferred to the applicant
  - e. Who pays the costs of the suit?

### **Analysis and determination**

20. The first issue for determination is whether or not the applicant is entitled to the portion measuring 20 meters by 25 meters of the suit land by adverse possession. The applicant's evidence was that since it bought the portion measuring 20 meters by 25 metres of the suit land in the year 1976, it took possession and has been farming the same and holding some church functions thereon. That the applicant has had control and management of the land. That the church put up a foundation for a Pastors house which is still on the land. The Respondent denied that the applicant occupies any portion of the land. He however admitted that PW2 had been cultivating the portion but with his permission. He stated that he is the owner of the land and had developed it by planting trees. On cross-examination however, he admitted that there is a boundary separating the 20 m by 25 m portion from the rest of the land. That the boundary was there when he bought the land. That he planted trees on the land but not on the portion that the church was claiming.
21. I have considered the evidence. Though the Respondent denied that the applicant has occupation of the suit land, it is clear from the evidence that the portion of 20 metres by 25 metres is in the possession and control of the applicant. Members of the plaintiff church have been cultivating it and planting crops. The applicant placed a foundation for a Pastor's house thereon. If the portion was vacant there could have been nothing to prevent the Respondent from planting trees thereon as he planted on the



rest of the land. I find that the applicant is entitled to the portion of the land measuring 20 meters by 25 meters by adverse possession. It is clear that the Respondent has never been in possession of the portion claimed by the applicant.

22. The next issue is whether or not the Respondent's title to the portion measuring 20 metres by 25 meters of the suit land has been extinguished. Under Section 17 of the *Limitation of Actions Act* at the expiration of the period of Limitation the title of the registered owner who ought to have taken action to stop the adverse possession becomes extinguished. The Respondent's case is that he got title to the suit land in the year 2001. The applicant stated that it entered the land in the year 1976 when it purchased the land. From 2001 to 2022 when the suit was filed is a period of about 21 years. Under S 7 of the *Limitation of Actions Act*, the Respondent ought to have taken action within 12 years from the date he acquired title to stop the adverse possession and recover the land. But as at the time of testifying in court in this case, the portion was still intact, he had not planted trees thereon as he did on the rest of the land and the boundary separating the portion from the rest of the land was still intact. Though he claimed that PW2 was cultivating the land with his permission, the evidence of PW2 was that he was cultivating the land by virtue of being Pastor of the applicant church just like his predecessors had done. I find that the Respondent's title to the portion measuring 20 m by 25 metres of the suit land has become extinguished in terms of Section 17 of the Limitation of Action Act.
23. On whether or not the Respondent was holding the portion of the suit land in trust for the applicant, having found that the Respondent's title over the portion measuring 20 metres by 25 metres had become extinguished, it follows that the Respondent is holding that portion of the suit land in trust for the applicant.
24. On whether or not the portion of the suit land should be transferred to the applicant, having found that the applicant is entitled to the portion of land by adverse possession and that the Respondent's title in respect thereof has become extinguished, I find that the portion of the suit land measuring 20 meters by 25 meters demarcated on the ground with a boundary should be carved off and transferred to the applicant.
25. Although under the provisions of Section 27 of the *Civil Procedure Act*, costs follow the event, for the reason that the parties herein are church and member, it is in the interest of justice that each party bear own costs of the suit.
26. In the end, this court finds that the Plaintiff has proved its case on a balance of probabilities and hereby enters judgement in favour of the plaintiff for; -
  - i. A declaration that the Plaintiff has acquired title to the portion of the suit land measuring 20 meters by 25 meters of the suit land by adverse possession.
  - ii. A declaration that the Respondent's title in respect of the portion measuring 20 meters by 25 meters of the suit land has become extinguished.
  - iii. A declaration that the Respondent holds the portion measuring 20 meters by 25 meters in trust for the plaintiff.
  - iv. An order for transfer of the portion measuring 20 meters by 25 meters in favour of the plaintiff by the Defendant in default of which the Deputy Registrar of the Court to execute the requisite documents to effect transfer.
  - v. Each party to bear own costs of the suit.

Orders accordingly.



**JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED VIRTUALLY THIS 13<sup>TH</sup> DAY OF JUNE, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Ajevi: Court Assistant.

Karani for the plaintiff/Applicant.

Ondego for the Defendant/Respondent.

